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No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

v.

O'NEAL STEEL, INC. AND UNITED STEELWORKERS OF AMERICA,

Respondents.

MEMORANDUM OF RESPONDENT UNITED STEELWORKERS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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This case involves nothing more than the application of settled rules of law to a unique set of facts—facts which petitioner ignores in part and misstates in part in his petition for a writ of certiorari.[1] The rules were settled by this Court in *Vaca* v. *Sipes,* 386 U.S. 171 (1967) and have been reaffirmed by the Court on several occasions since. *E.g., Amalgamated Ass'n of Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976); *IBEW* v. *Foust,* 442 U.S. 42 (1978). The court below faithfully applied *Vaca* and its progeny to the particular facts of this case. Nothing in the decision below warrants plenary review by this Court.

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[1] To place before this Court all relevant facts, we are filing with this petition one copy of the appendix that was filed in the court of appeals and which contains most of the trial transcripts and exhibits. That appendix is cited herein as "C.A. App. ....." The appendix to the petition for a writ of certiorari is cited as "Pet. App. ....."

Judge Kravitch's opinion for the court below begins by recognizing, as this Court has repeatedly held, that "As exclusive collective bargaining agent for [petitioner], the union had a statutory duty to fairly and without hostility or discrimination represent his grievance. *Vaca* v. *Sipes,* 386 U.S. 171 (1967)" (Pet. App. A-3). At the same time Judge Kravitch recognized, as this Court also has held, that the union's duty "is not a ministerial one of satisfying each employee's demand at all costs"; rather, the union must "exercise judgment and discretion in its representative capacity" (*Id.*). As this Court recently put it:

> [U]nion discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing frivolous claims, and strengthens the employer's confidence in the union . . . Without these screening and settlement procedures . . . the costs of private dispute resolution could ultimately render the system impracticable. [*IBEW* v. *Foust, supra,* 442 U.S. at 51.]

Thus Judge Kravitch stated "[t]he key question" here as follows: "whether the union in this case abused its discretion and acted in an arbitrary or discriminatory manner or in bad faith when it decided not to proceed with arbitration of the plaintiff's grievance" (Pet. App. at A-3).[2]

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[2] The decision below is consistent not only with *Vaca* but with the prior fair representation decisions of the Fifth Circuit, decisions which in no way evidence a "consistent[] refus[al] to follow *Vaca* v. *Sipes* and *Hines* v. *Anchor Motor Freight, Inc.,*" as petitioner alleges (Pet. at 3). To the contrary, the Fifth Circuit has uniformly recognized, as it did here, that "[t]here is a duty of fair representation in all Union dealings implicit in the Congressional grant to unions . . . of the exclusive power to represent all employees in the collective bargaining unit." *Mumford* v. *Glover,* 503 F.2d 878, 882 (1974) (Goldberg, J.). The court has explained that "the duty is defined by three distinct standards of conduct": the "arbitrary," "discriminatory," and "bad faith" standards

The district court, of course, had framed the issue before it in similar terms (Pet. App. B-5). But in addressing that

established in *Vaca. Sanderson* v. *Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir. 1973); *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 957, n.6 (5th Cir. 1976). And with respect to the grievance processing context—the context in which this case arises—the court has stated that "It is beyond doubt that the duty of fair representation includes an obligation to investigate and to ascertain the merit of employee grievances," *Turner* v. *Air Transport Dispatchers Ass'n*, 468 F.2d 297, 299 (5th Cir. 1972), and that "a union may not arbitrarily ignore a meritous grievance or process it in a 110 (5th Cir. 1973); *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, perfunctory manner," *Lomax* v. *Armstrong Cork Co.*, 433 F.2d 1277, 1281 (5th Cir. 1970). Thus in *Lowe* v. *Pate Stevedoring Co.*, 558 F.2d 769, 771 n.2 (5th Cir. 1977), the court reversed a district court decision granting j.n.o.v. to a union, finding that "the jury . . . could reasonably have concluded that the union acted in "bad faith by perfunctorily processing Lowe's grievance. Such perfunctory treatment of a grievance constitutes a breach of the duty of fair representation."

Petitioner lists fourteen cases which, he claims, show that "The court below has consistantly [sic] failed to uphold findings of fair representation" (pet. at 12). In fact, in the overwhelming majority of the cases cited by petitioner the findings were precisely to the contrary, and the appellate court merely affirmed the district court's findings, twice by order, *Burchfield* v. *Steelworkers*, 577 F.2d 1018 (5th Cir. 1978), and *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir. 1971); three times by *per curiam* opinions, *Coe* v. *Rubber Workers*, 571 F.2d 1349 (5th Cir. 1978); *Franklin* v. *Crosby Typesetting Co.*, 568 F.2d 1098 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978); *Encina* v. *Tony Lama Boot Co.*, 448 F.2d 1264 (5th Cir. 1971); and four times by opinions authored by, respectively, Chief Judge Brown, and Judges Rubin, Clark, and Simpson, *Connally* v. *Transcon Lines*, 583 F.2d 199 (5th Cir. 1978); *Cox* v. *C. H. Masland & Sons*, 607 F.2d 138 (5th Cir. 1979); *Turner* v. *Air Transport Dispatcher Ass'n, supra;* and *Watson* v. *INT Teamsters*, 399 F.2d 875 (5th Cir. 1968). The remaining cases petitioner cites include one in which the court of appeals *reversed* a judgment *dismissing* a fair representation claim and remanded

issue, the district court had placed great weight on a factor which the court of appeals held is legally irrelevant under *Vaca:* the district court's own view of the merits of petitioner's grievance. And the court of appeals also held that, as a matter of law, the remaining evidence would not be sufficient to enable the district court to conclude that the union breached its duty here. Accordingly, the appellate court reversed the district court's decision and directed that judgment be entered for the union. As we proceed to show, the twin holdings of the court of appeals on which its judgment rests closely parallel *Vaca,* are entirely correct in their own right, and are not worthy of review by this Court.

1. In determining that the union had breached the duty of fair representation, the district court reasoned that since, in its view, petitioner "possessed an excellent chance of winning in arbitration" it "was certainly arbitrary for the Union not to proceed at least to the point of determining who the actual arbitrator would have been" (Pet. App. B-5). But in *Vaca* this Court explicitly rejected that approach to determining when the duty of fair representation has been breached. The *Vaca* Court explained that the successful operation of a grievance-arbitration procedure requires that a union be free to settle grievances short of

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the case for a trial on the claim, *Mumford* v. *Glover, supra;* one in which the court affirmed a judgment dismissing a § 301 action because plaintiff had *failed* to allege a breach of the duty, *Lomax* v. *Armstrong Cork Co., supra;* one in which the court remanded for a new trial after holding that the district court had erred in directing a verdict in plaintiff's favor, *Sanderson* v. *Ford Motor Co., supra;* and one in which the court overturned a preliminary injunction against a discharge on factual and legal grounds, *Bures* v. *Houston Symphony Society,* 503 F.2d 842 (5th Cir. 1974). In only one case was a final judgment in plaintiff's favor reversed, principally on legal grounds, *Tedford* v. *Peabody Coal Co., supra.* In none of the fourteen cases was there a dissent.

arbitration lest the grievance machinery become so "overburden[ed]" as to "prevent it from functioning successfully." *Id.* at 192. And the *Vaca* Court found that this freedom to settle grievances would be substantially impaired "if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious." *Id.* at 192-93. Accordingly, *Vaca* held that the lower court had erred in sustaining the jury verdict against the union in that case on the basis of evidence from which the jury could have concluded that, in its view, the plaintiff's grievance, which had been withdrawn before arbitration, was meritorious. *Id.* at 193. Thus, the court of appeals here, in likewise holding that the district court had "misapplied the test used to determine whether a union's failure to complete arbitration is a breach of its duty" (Pet. App. at A-2), was simply following the teaching of *Vaca.* This aspect of the decision below therefore presents no question worthy of this Court's review.

2. Having removed this legally erroneous prop from the district court's decision, the only remaining issue for the court of appeals to decide was whether the district court's judgment could stand on the legs that were left, *i.e.,* to determine whether, as a matter of law, the remaining evidence would support a conclusion that the union had breached its duty. That is precisely the inquiry this Court undertook in *Vaca,* after rejecting the lower court's legal theory. And the Fifth Circuit's conclusion here was the same as the conclusion reached by this Court in *Vaca:* "as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation." 386 U.S. at 193.

Of necessity, the appellate court's determination on this question is entirely dependent upon the particular facts of this case—facts which are unique and are not likely to

recur.[3] That is, of course, reason enough for denying the petition for a writ of certiorari. But as we now show, the

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[3] For the same reason, the decision below is not, as petitioner urges (Pet. at 8), in conflict with decisions of other circuits—decisions which depend on facts quite different from the facts involved here, and which therefore raised questions quite different from the question presented by this case. In *Ruzika* v. *General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), for example, the issue was whether the union's inadvertent failure to appeal a grievance to arbitration in a timely fashion breached the duty of fair representation; that question is not implicated here since, as we show, the union made a deliberate judgment that petitioner's grievance did not merit presentation in arbitration. Nor does this case present the question involved in *Robesky* v. *Quantas Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978), in which the court considered whether the union breached its duty by failing to advise plaintiff, before she decided whether to accept an offer of reinstatement without back pay, that the offer provided plaintiff her only chance of securing her job since her grievance already had been withdrawn. And while *Soto Segarra* v. *Sea Land Service, Inc.*, 581 F.2d 291 (1st Cir. 1978) and *Willets* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978), involved questions similar to the one posed here, the facts of those two cases are entirely distinguishable. In *Soto Segarra* the union, despite repeated requests (to which the union did not respond), refused to file a grievance over the discharge of plaintiff, who was a leading critic of the union, and "[n]o evidence even remotely indicated that the union's failure to process the grievance was based on investigation and evaluation of the merits," 581 F.2d at 295. In *Willetts*, the court merely stated, in *dictum*, that the district court should not have granted summary judgment against plaintiff where there was a factual conflict between his affidavit and the affidavits of union officers and where, if plaintiff's version of the facts were true, nothing was done with plaintiff's grievance and plaintiff was falsely told for five months that the grievance was pending. As we show below, the evidence adduced at the trial in the instant case shows that, in contrast to *Soto Segarra* and *Willets*, petitioner's grievance was processed through the steps leading to arbitration and was eventually withdrawn "based on an investigation and evaluation of the merits."

decision below is not only without general significance, but also entirely correct.

Petitioner and a fellow employee, Clarence Landrum, were discharged for fighting with each other at work.[4] This was the second time petitioner had been discharged by O'Neal Steel; on the first occasion, in 1971, the union filed a grievance on petitioner's behalf which was handled by staff representative William Caldwell (C.A. App. 102-103). In that grievance the arbitrator, while discrediting petitioner's testimony that he had done no wrong, ruled that the punishment of discharge was too severe in light of petitioner's work record as of that time (*Id.* at 216-24). Accordingly, the arbitrator gave petitioner a second chance by ordering him reinstated (without back pay).

Following his second discharge the union again filed a grievance for petitioner.[5] As part of its investigation of that grievance the union obtained from the company copies of sworn statements signed by witnesses to the fight; those statements indicated that petitioner struck the first blow (*Id.* at 236-39), (and *not,* as petitioner alleges, that petitioner "was merely defending himself" (Pet. at 16)). The union also interviewed each of the persons who had signed a statement; the witnesses all adhered to their state-

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[4] The district court stated that the fight occurred over a "calendar in the plaintiff's possession" which "Landrum attempted to take . . . from him" (Pet. App. B-3) and that petitioner "was acting in defense of his property." (*Id.* at B-7). What the district court neglected to mention, however, was that according to petitioner's own testimony, petitioner obtained "possession" of the calendar by taking it from a bench in the bathhouse where Landrum had placed it while dressing, and that prior to taking the calendar and walking off with it petitioner had never previously possessed it (C.A. App. 61-62, 84-85).

[5] Landrum told the union not to file a grievance for him since he believed that he and petitioner were both cupable and thus could not win grievances (C.A. App. 154-55).

ments and the eyewitness who was closest to the fight informed the union (as he later testified at trial (C.A. App. 138-39)), that petitioner started the fight and did so *before* Landrum brandished a knife (*Id.* at 44-45, 158, 162, 172, 179).[6] The grievance committee spoke, as well, to the two individuals whom petitioner claimed would support his version of the facts; those individuals told the union, however, *id.* at 49 (as petitioner ultimately conceded at trial, *id.* at 113), that they had not witnessed the fight. Finally, the union grievance committee, including Caldwell, met with petitioner for an hour to discuss the grievance and to reenact the fight (*Id.* at 115, 180).[7] In the course of the meeting the union advised petitioner that his grievance looked doubtful because of the statements of the witnesses to the fight (*id.* at 104-05); petitioner responded that the witnesses were liars and that the closest eyewitness would change his testimony (*Id.* at 179).

Petitioner's grievance was heard initially in the second

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[6] At trial, the district court cross-examined this eyewitness at some length, *id.* at 141-47, but was unable to shake his testimony. Notwithstanding this testimony (by a disinterested witness) and the testimony that petitioner had given a similar version of the fight to the union, see n.7, *infra*, the district court found that Landrum brandished the knife first (Pet. App. B-6).

[7] Caldwell, Grievance Committee Chairman Ford, and Local President Walters each testified that during the course of the committee meeting with petitioner, petitioner admitted that he had struck the first blow, and had done so before Landrum drew his knife (C.A. App. at 149, 168-69, 180-81). Bobby McCarle, the plant superintendent, testified that petitioner told him the same thing immediately before petitioner was discharged (*Id.* at 330). And all of the above-named witnesses, plus Personnel Director Hallmon (*Id.* at 231), testified that at the third step meeting petitioner admitted to striking the first blow. At trial, however, petitioner denied having made such a statement to the union, to McCarle, or at the third step meeting (*Id.* at 210). The district court did not resolve this conflict in the testimony.

step of the grievance procedure where it was denied by the company (*Id.* at 245).[8] The grievance was then appealed to the third step; petitioner met with the grievance committee before the third step meeting and attended the meeting along with his union representatives (*Id.* at 18). At the third step the union's argument that petitioner was not at fault was rejected by the company (*Id.* at 246). To meet the deadline for appealing the grievance to arbitration the union filed a protective appeal and began the process of selecting an arbitrator[9] while the union considered whether the grievance merited arbitration (*Id.* at 26). It was the union's practice carefully to screen grievances for arbitration; only a handful of cases were presented in arbitration each year (*id.* at 209-10), and between 1969 and 1976 only 10 discharge cases were heard in arbitration (*Id.* at 297).

Before deciding whether to present the grievance in arbitration, the union grievance committee met with Caldwell (*Id.* at 27).[10] Caldwell pulled prior discharge cases out of

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[8] Under the collective bargaining agreement, to expedite discharge grievances the first step of the grievance process could be bypassed.

[9] The district court's statement (Pet. App. B-4) that "the Union and [petitioner] were unable to agree upon a list of arbitrators" and that they obtained a list "from which [petitioner] and the Union would alternate striking names" is, of course, incorrect, as the appellate court recognized (*Id.* at A-3). It was the union and the *company* who could not agree on the list and who were to do the striking.

[10] Petitioner asserts in his petition that he did not receive notice of this meeting (Pet. at 13). At trial, Caldwell and Grievance Chairman Ford testified that they each personally notified petitioner of the time and place of the meeting and requested him to attend (C.A. App. 27, 171). Petitioner denied having received such notification. (*Id.* at 73). The district court did not resolve this conflict, and the court of appeals thought it unnecessary to resolve the conflict since, in any event, "lack of notice is not determinative on the issue of good faith" (Pet. App. at A-8).

the union's file looking for support for the union's position; none of the cases he found and reviewed with the committee were supportive (*Id.* at 29, 52).[11] The union also consulted with a union attorney and with a director of the International union (*Id.* at 152-53). Based on all the information before it—including the adverse witnesses and statements, the absence of any witnesses willing to state that Landrum was the aggressor, and the prior arbitration decision finding petitioner guilty of misconduct but offering him a second chance—the three-member committee unanimously decided that the grievance did not merit presentation in arbitration (*Id.* at 153).[12] Accordingly, the grievance was withdrawn.[13]

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[11] The petition alleges that "although [Caldwell] knew of cases where the discharge had been set aside under similar circumstances, these were not presented to the committee" (Pet. at 6). No citation is offered for this statement. The ommission is understandable: there is not one iota of evidence in the record which supports this assertion.

[12] The union's assessment of this grievance was confirmed at trial by an arbitrator called as an expert by the company who testified (contrary to the assertion in the petition (at 16)) that "the probable result in the arbitration of the case is that the discharge would be upheld" (C.A. App. 311).

[13] Petitioner attempts to make a great deal of the union's alleged misrepresentation in supposedly telling petitioner that his grievance had been lost in arbitration rather than withdrawn. At trial, Grievance Chairman Ford testified that immediately after the committee decided to withdraw the grievance (at the meeting which petitioner did not attend), he (Ford) called petitioner and so informed him. Ford further testified that petitioner then requested to talk with Caldwell (C.A. App. 174-75). Caldwell, who was present during Ford's phone call, confirmed Ford's testimony and Caldwell testified that he also told petitioner the grievance was being withdrawn during the same phone call (*Id.* at 30). And grievance committee member Jones testified that after the grievance was withdrawn petitioner called him to ask the reasons for the union's decision (*Id.* at 50). In his testimony, however, peti-

A word is required concerning the allegation that the union here was guilty of racial discrimination in withdrawing petitioner's grievance. Petitioner did not make any claim of racial discrimination in his complaint, in the pretrial order, in his trial testimony, or in his post-trial submissions. In fact, there was no mention of race at trial [14] except when the *district court* inquired as to the racial composition of the grievance committee (and learned that one-third of the members attending the final meeting were black) (*Id.* at 200). The racial discrimination issue was injected into this case, *sua sponte,* by the district court, months after trial had concluded. As the court of appeals found, the district court's "conclusory statement" attributing discriminatory motive to the union was "unsupported by any evidence" (Pet. App. A-5).

That the court of appeals concluded that this record would not support a finding of a breach of duty is hardly surprising. The record here contains no evidence of any discriminatory, arbitrary, or bad faith conduct on the part of the union.[15] Rather, what the evidence establishes in that the union diligently investigated the facts surrounding

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tioner, while recalling having received a call from Ford at about the time the grievance was withdrawn, maintained that he was informed in the call that the union "had taken my case to arbitration, and I didn't show up . . . and the arbitration turned my case down" (*Id.* at 73, 113). The district court accepted petitioner's recollection over the testimony of Caldwell, Ford and Jones and thus found that the union had misrepresented the disposition of the grievance (Pet. App. B-6). The court of appeals expressed skepticism about this finding but did not decide whether it was clearly erroneous "since the misrepresentation, if it took place, would have occurred *after* the alleged bad faith action [by the union]" (Pet. App. A-5) (emphasis in original).

[14] Thus there is not even evidence in the record to support the district court's assertion that the union was mostly white (Pet. App. B-4)—an assertion which is, in reality, contrary to fact.

[15] Indeed, in his petition for a writ of certiorari, petitioner him-

petitioner's grievance and reached a judgment as to the

self concedes (at 20) that "there is not doubt that [the grievance committee] attempted to make a reasonable decision based upon the material before them." Petitioner rests his entire claim, then, on Caldwell's alleged hostility. A brief comment on the state of the record with respect to Caldwell's "hostility" is thus in order.

Petitioner did not mention in his testimony at trial that Caldwell manifested any hostility towards him either in successfully handling the first discharge grievance or in processing the second discharge grievance. In fact, petitioner mentioned Caldwell only a few times in his testimony, once to describe a meeting with Caldwell, once to describe a phone call, and once to state Caldwell handled petitioner's prior discharge grievance (C.A. App. 70-74, 103, 106). Nor did Caldwell articulate any hostility towards petitioner. The issue of Caldwell's alleged hostility was injected into the case by the district court based solely upon what it perceived as Caldwell's hostile demeanor at trial; the court assumed that the hostility predated the filing of this action in which petitioner in effect challenged the manner in which Caldwell had performed his job.

The district court attempted to buttress its finding of hostility by attributing to Caldwell a remark which the court characterized as amounting to a " 'don't call us, we'll call you' " statement (Pet. App. B-6). In fact, as the court of appeals recognized (*Id.* at A-5), neither petitioner nor any other witness attributed any such remark to Caldwell. Petitioner testified that *Walters* (who did *not* attend the meeting at which the decision was made to withdraw petitioner's grievance (C.A. App. 29)), told petitioner to stop calling (*Id.* at 72); Walters testified that what he told petitioner was to stop calling late at night (*Id.* at 178). (In rebuttal petitioner denied calling late at night and stated that he usually called late in the afternoon and was told by Walters' wife when Walters would be home; in surrebuttal Walters testified that he was separated from his wife at the time and living alone (*Id.* at 210-12).)

In any event, as the court of appeals observed, "the trial judge did not find nor could he find on the record that Caldwell's hostility motivated the union to withdraw the grievance from arbitration. . . . [T]he demeanor of a witness at trial may be considered in evaluating the credibility of that witness, but it cannot by itself uphold a finding of union hostility" (Pet. App. A-5-6).

grievance's lack of merit—a judgment with which petitioner and the district court ultimately disagree. But as the court of appeals concluded, it simply cannot be said here "that the union's assessment that there was little chance of success was unreasonable" (Pet. App. A-17). Thus, the court's conclusion that on these unique facts no breach of the duty was established is unassailable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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